IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-782

GATEWAY COAL COMPANY, *Petitioner,*

v.

UNITED MINE WORKERS OF AMERICA;
DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA;
LOCAL NO. 6330, UNITED MINE WORKERS OF AMERICA,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA
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## INDEX


| | Page |
|---|---|
| Motion for Leave To File Brief *Amicus Curiae* ..... | 1 |
| Brief *Amicus Curiae* ..... | 5 |
| The Argument ..... | 6 |
| 1. Federal Labor Policy Favors Arbitration ..... | 6 |
| 2. The Dispute in the Present Case Is Covered by the Arbitration Provisions of the Contract Between the Parties ..... | 7 |
| 3. The Decision of the Third Circuit Permits Circumvention of Federal Labor Policy Favoring Arbitration Where the Dispute Concerns a Safety Matter ..... | 8 |
| 4. The Interpretation of Section 502 by the Lower Court Is Contrary to Established Legal Precedent ..... | 10 |
| 5. The New Construction of Section 502 Will Be a Disruptive Influence on All Labor-Management Relations ..... | 12 |
| Conclusion ..... | 15 |


## AUTHORITIES CITED

CASES:


| | |
|---|---|
| Boys Market, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) ..... | 7, 8 |
| Collyer Insulated Wire, 192 NLRB No. 150 (1971) ... | 6 |
| Gateway Coal Company v. United Mine Workers of America, 466 F.2d 1157 (3rd Cir. 1972) ..... | 13 |
| Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 369 U.S. 95 (1962) ..... | 8 |
| NLRB v. Erie Resistor Corporation, 373 U.S. 221 (1963) ..... | 11 |
| NLRB v. Fruin-Colnon Construction Co., 330 F.2d 885 (8th Cir. 1964) ..... | 12 |

Page

NLRB v. Knight Morely Corp., 251 F.2d 753 (6th Cir. 1957), cert. denied 357 U.S. 927 (1958), reh. denied 358 U.S. 858 (1958) ..... 12
NLRB v. Truck Drivers Union, 353 U.S. 87 (1957) .. 11
Redwing Carriers, Inc., 130 NLRB 1208 (1961) ..... 10
Spielberg Manufacturing Co., 130 NLRB 1080 (1955).. 6
United Steelworkers of America v. Warrier & Gulf Navigation Co., 363 U.S. 574 (1960) ..... 7, 9

STATUTES:

Labor Management Relations Act, as amended (61 Stat. 136, 73 (Stat. 519, 29 U.S.C. §§ 151, et seq.)

Section 203(d) ..... 6
Section 301 ..... 6, 7
Section 502 .....9, 10, 11, 12, 13, 14

MISCELLANEOUS:

Speech of W. J. Usery, Jr. before the Annual Institute of Labor Law of the Southwestern Legal Foundation on October 27, 1972, 81 LRR 227 ..... 14

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## MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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The National Association of Manufacturers hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* in this case. The consent of the Attorney for the Petitioner has been obtained. The

consent of the Attorney for the Respondents was requested but no reply was received.

The National Association of Manufacturers (NAM) is a nonprofit voluntary business organization organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing and related concerns of all sizes located throughout the United States and represents a substantial proportion of the nation's industrial employment. A substantial number of its members have collective bargaining agreements with labor organizations and may, therefore, be directly affected by the decision in this case.

In the day-to-day labor-management relations of industrial concerns, grievances often arise which involve some aspect of safety. This case is of particular interest to the members of the NAM because a fundamental, far reaching issue is presented involving the authority of a court to order arbitration and enjoin a strike when there is a labor dispute over a matter related to safety. The Third Circuit based its decision on an interpretation of Section 502 of the Labor Management Relations Act which is in conflict with the interpretation of other circuits and of the National Labor Relations Board. The decision is repugnant to federal labor policy favoring arbitration and it will adversely effect the stability of labor-management relations. It is, therefore, of vital importance to have Section 502 interpreted so that both employers and employee will understand their rights and obligations in such circumstances.

Accordingly, the NAM has an interest in the proper resolution of the issues before the Court in this case and urges that leave be granted to file the accompany-

ing brief as *amicus curiae* and respectfully so moves this Court.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

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## BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER

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### INTEREST OF AMICUS CURIAE

The interest of the National Association of Manufacturers (NAM), in this case is set forth in the foregoing Motion for Leave to File Brief Amicus Curiae.

## ARGUMENT

### 1. Federal Labor Policy Favors Arbitration.

The federal policy favoring voluntary settlement of labor disputes through the arbitral processes finds specific expression in Section 203(d) of the Labor Management Relations Act, in which Congress declared:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

The National Labor Relations Board (NLRB) has followed a policy of encouraging and accepting arbitration awards. In *Spielberg Manufacturing Company,* 112 NLRB 1080, 1082 (1955) the Board stated:

> "In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor dispute will best be served by our recognition of the arbitrators' award."

In *Collyer Insulated Wire,* 192 NLRB No. 150 (1971), the Board added a new dimension to its policy regarding arbitration. It held that if the alleged unfair labor practice involved an interpretation of the collective bargaining agreement between the parties and it was subject to the grievance/arbitration provisions of that contract, then the Board would defer to the contractual procedure.

Actions for breach of a collective bargaining agreement may be brought under Section 301 of the Labor-Management Relations Act. In the past when Section

301 has been considered by this Court, the federal policy favoring arbitration has been affirmed. In *United Steelworkers of America* v. *Warrior & Gulf Navigation Company,* 363 U.S. 574, 582-83 and 584-85 (1960), this Court said:

> "An order to arbitrate the particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.
>
> * * * * * *
>
> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad."

More recently in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235, 252 (1970), this Court suggested that arbitration has become "the central institution in the administration of collective bargaining contracts."

In view of this history, a decision which permits circumvention of the arbitral process must be suspect.

**2. The Dispute in the Present Case is Covered by the Arbitration Provisions of the Contract Between the Parties.**

The collective bargaining agreement between the parties contained detailed procedures for settling local disputes and other procedures for disputes which are national in character. Specifically, the contract provided: "Should differences arise between the Mine Workers and the operators as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically

mentioned in this agreement, or should any local trouble of any kind arise at the mine, . . ." it will be resolved through a five-step procedure ending in arbitration (Petitioner's App. 13a). The contract later provides that disputes which are not settled through the above procedure because they are "national in character," are to be resolved by "free collective bargaining as heretofore practiced in the industry." (Petitioner's App. 15a). There is no claim that the present dispute is "national in character."

It would be difficult to conceive of a broader or more inclusive arbitration clause than the one contained in the above cited contract. Although the contract between the parties does not contain an express no-strike clause, such a clause may be implied where grievances are subject to final and binding arbitration. As this Court reasoned in *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Company,* 369 U.S. 95, 105 (1962): ". . . a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." It is submitted that in the circumstances of this case the strike should have been enjoined under this Court's reasoning in *Boys Markets, Inc.* v. *Retail Clerks Union, supra.*

**3 The Decision of the Third Circuit Permits Circumvention of Federal Labor Policy Favoring Arbitration Where the Dispute Concerns a Safety Matter.**

The crux of the decision of the Court of Appeals for the Third Circuit is that if employees believe in good faith that "abnormally dangerous" working conditions exist, they may strike during the term of their collec-

tive bargaining agreement regardless of the contractual provisions or whether objective evidence shows that the conditions are in fact unsafe. It concluded that a dispute involving a matter of safety is not subject to arbitration because "it is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration, and the practice of the parties has been to the contrary." (Petitioner's App. C, p. 16a in his Petition for Cert.). The Court's statement assumes that a matter is not arbitrable unless it is specifically stated in the contract. That assumption is contrary to the pronouncement of this Court in *Warrior & Gulf, supra.* Furthermore, the fact that the parties have been able to resolve past safety disputes without recourse to arbitration or strikes does not warrant the conclusion that the arbitration provisions of the contract are not applicable.

The lower court realized that its decision was grafting an exception onto the established rule and, after paying lip service to a "strong federal policy in favor of arbitration" stated: "Considerations of economic peace that favor arbitration of ordinary disputes have little weight here .... If employees believe the correctable circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be." (Petitioner's App. C, p. 17a in his Petition for Cert.). The court did not cite any judicial decisions for this aspect of its holding. Instead, it cited Section 502 of the Labor Management Relations Act, which provides: ". . . nor shall the quitting of labor by an employee or employees in good faith because of

abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act." The court concluded that the employees were protected by a mere "good faith" assertion that conditions were unsafe regardless of whether in fact they were. That is the first time, so far as we have been able to ascertain, that the application of Section 502 has been held to turn solely on the good faith belief of employees when there was a lack of objective evidence to support the claim of the employees. Since only a subjective test—the "good faith" belief of the employees—is used, the decision of the court disregards objective criteria. This permits circumvention of federal labor policy favoring arbitration by the naked allegation that conditions are "abnormally dangerous."

**4. The Interpretation of Section 502 by the Lower Court is Contrary to Established Legal Precedent.**

The National Labor Relations Board and two Courts of Appeals have interpreted Section 502 differently from the Third Circuit. A clear statement by the NLRB on the meaning of Section 502 was made in *Redwing Carriers, Inc.*, 130 NLRB 1208, 1209 (1961) when it said:

> "It is necessary first to clarify the meaning of the term 'abnormally dangerous conditions' as used in Section 502. We are of the opinion that the term contemplates, and is intended to insure, an objective, as opposed to a subjective, test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'"

The Board has consistently used that test in subsequent cases where Section 502 has been raised to justify violation of a no-strike clause. The interpretation of the Board should be accorded special weight. This Court has recognized the special expertise of the Board in balancing the conflicting interests of employers and employees. In *NLRB* v. *Truck Drivers Union,* 353 U.S. 87, 96 (1957) this Court reviewed a decision of the Board which involved the question of whether members of an employer association committed an unfair labor practice by locking out employees. This court stated: "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."

Again, in *NLRB* v. *Erie Resistor Corporation,* 373 U.S. 221, 236 (1963), this Court considered the Board's analysis in finding that the granting of super-seniority to non-striking employees was an unfair labor practice. In upholding the decision of the Board, this Court said: "Here, as in other cases, we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life, . . . and of '[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases' from its special understanding of 'the actualities of industrial relations.' "

The question now before the Court requires a balancing of the interest of employees in not being required to work under abnormally dangerous conditions and the right of the employers to expect employees to honor

their no-strike commitment. It is submitted that this Court should give great weight to the Board's interpretation of Section 502. It is significant that two Courts of Appeals have agreed with the NLRB and held that competent objective evidence was necessary to apply Section 502. *NLRB* v. *Fruin-Colnon Construction Co.*, 330 F.2d 885 (8th Cir. 1964); *NLRB* v. *Knight Morely Corp.*, 251 F.2d 753 (6th Cir. 1957), cert. denied 357 U.S. 927 (1958) reh. denied 358 U.S. 858 (1958). The present case is the first instance which rejects the requirement that an objective standard be used in determining whether abnormally dangerous conditions exist.

**5. The New Construction of Section 502 Will be a Disruptive Influence on all Labor-Management Relations.**

With the new construction placed on Section 502 by the court below, requiring only a good faith belief by the employees involved to bring them under the protection of Section 502, that Section becomes of major significance in all labor relations. It can be used to undermine a no-strike clause and defeat the grievance/arbitration procedures established by the contract. The decision of the lower court is not merely an erroneous interpretation of some little used section of the Act, rather, the decision introduces a new factor into labor-management relations. As pointed out by Circuit Judge Rosenn in his dissenting opinion:

> "This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard. If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbi-

> tration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy of 'wildcatters.' In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes." *Gateway Coal Company* v. *United Mine Workers,* 466 F.2d 1157, 1162 (3rd Cir. 1972), Petitioner's App. C, p. 22a in his Petition for Cert.

The practical effect of the decision is to encourage employees who want to strike during the term of a contract, but are bound by a no-strike clause, to discover some safety grievance to use as a pretext for a strike. The present case presents just such an example: There was substantially more fresh air entering the mine, even with the obstruction, than was required by either state or federal law, (R. 9-10 of Appellant's App.). After the normal flow of air was restored, there was clearly no physical danger to miners, but they refused to work claiming that as long as the two negligent supervisors were responsible for safety procedures, the miners' lives were jeopardized. The naked assertion was accepted by the lower court to justify the application of Section 502 and the refusal to enjoin the strike. The Court did not require any objective evidence to support the miners' contention that the premises were unsafe. This reasoning creates a loophole by which unions can escape the arbitration provisions of their contract and engage in a strike. Since some safety aspect can be easily injected into many grievances arising in the industrial community, the decision will have an unstabilizing effect on labor-management relations.

That strikes during the term of collective bargaining agreements are a national problem is shown by the remarks of the then Assistant Labor Secretary W. J. Usery, Jr., before the Annual Institute of Labor Law of the Southwestern Legal Foundation on October 27, 1972. He pointed out that approximately one-third of all strikes occur during the term of collective bargaining agreements. In order to cope with that problem he announced:

> "The Labor-Management Services Administration is currenting funding a study by the Bureau of Labor Statistics which we hope will furnish further insights into this problem. The study should reveal issues which precipitate such strikes, whether these issues were major subjects of prior negotiations, whether grievance procedures were followed, and whether the disputed issues were subject to binding arbitration." (81 LRR 227).

The decision of the lower court could aggravate this already serious problem of strikes during the contract term by permitting strikes on the bare assertion that the premises are unsafe, regardless of the contractual provisions or objective evidence relating to the alleged unsafe condition. Therefore, it is urged that this Court interpret Section 502 to require an objective test in determining whether abnormally dangerous conditions exist.

## CONCLUSION

It is respectfully submitted that the encouragement of the federal policy favoring arbitration and the fostering of stable labor-management relations warrant the reversal of the decision of the Court of Appeals and the reinstatement of the Order of the District Court.

Respectfully submitted,

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